TABLE OF CONTENTS.

	PAGE
Petition	1
Case History	1
Question Presented	2
Brief	7
FIRST POINT—The Circuit Court of Appeals misinterpreted and misapplied the decision of this Court in the *Slocum* case and gave to it a construction inconsistent with its own recent decisions	7
SECOND POINT—The decision of the Circuit Court of Appeals is contrary to the strictly limited interpretation placed upon the *Slocum* case by subsequent decisions of this Court and Lower Federal Courts	13
LAST POINT—The prayer of the petitioner should be granted	19

TABLE OF CASES:

Bohenik v. *Delaware & Hudson Co.*, 49 F. (2d) 722... 4

Capital Traction Co. v. *Hof*, 174 U. S. 1, 13..... 16
Clemence v. *Hudson & M. Ry. Co.*, 11 F. (2d) 913.... 3, 9

Gasoline Products Co., Inc. v. *Champlin Refining Co.*, 283 U. S. 494 (1931).....15, 17
Glynn v. *Krippner*, 47 F. (2d) 281..... 14
Glynn v. *Krippner*, 60 F. (2d) 406..... 14

Hoffman v. *American Mills Co.*, 288 Fed. 708.....3, 12

Isaacson v. *United States*, 3 Fed. Supp. 350..... 15
Italian Star Line, Inc. v. *United States Shipping Board Emergency Fleet Corporation*, 41 F. (2d) 382..... 11
Italian Star Line, Inc. v. *United States Shipping Board Emergency Fleet Corporation*, 53 F. (2d) 359....4, 10

PAGE

Parsons v. *Bedford*, 3 Pet. 433..... 16

Pedersen v. *Delaware, Lackawanna & Western R. R.*, 229 U. S. 146 (1913)..... 11

Redman v. *Baltimore & Carolina Line, Inc.*, 70 F. (2d) 635..... 1, 4

Royal Card & Paper Co. v. *Dresdner Bank*, 27 F. (2d) 791..... 4, 10

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364 (1913)..... 2, 3, 7, 8, 9, 10, 13, 14, 15, 16, 18

Supreme Court of the United States

OCTOBER TERM, 1934—No.

BALTIMORE & CAROLINA LINE, INC.,
(Defendant-Appellant below),
Petitioner,

—against—

DONALD REDMAN,
(Plaintiff-Respondent below),
Respondent.

Petition for Writ of Certiorari to Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Baltimore & Carolina Line, Inc., respectfully shows to this Honorable Court as follows:

1. *The Proceedings and Decisions of the Lower Courts.*

This is a petition for *certiorari* brought to obtain review of that part of the decision of the Circuit Court of Appeals for the Second Circuit, filed April 30, 1934, refusing a dismissal of the complaint without prejudice and remanding the cause for a new trial, after reversing a judgment entered on a jury verdict in favor of the respondent, in the District Court for the Southern District of New York on the 7th day of April, 1933. *Redman* v. *Baltimore & Carolina Line, Inc.*, 70 F. (2d) 635.

The action was instituted to recover damages for personal injuries allegedly caused by the petitioner's negligence.

Upon the trial, at the close of respondent's case and again, at the end of the entire case, motions were made by petitioner to dismiss the complaint for lack of proof (R., pp. 174-178, 295).

At the close of the entire case, petitioner moved for the direction of a verdict (R., p. 295).

The Trial Court reserved decision upon these motions until the jury had returned its verdict, when each motion was specifically denied (R., p. 320).

Petitioner's motion to set aside the verdict was likewise denied (R., p. 320).

Appropriate exceptions were duly taken in each instance (R., p. 320).

Upon appeal it was contended by petitioner that the denial by the Trial Court of these motions constituted reversible error. It was urged further that if the Circuit Court of Appeals should find that the complaint should have been dismissed for lack of proof at the close of plaintiff's case, the judgment should be reversed and the District Court directed to enter judgment dismissing the complaint without prejudice, that is: for lack of proof.

The Circuit Court of Appeals after reviewing the evidence, reversed the judgment below and remanded the case for a new trial. In doing so, it said (p. 638):

> "We have no power to direct a dismissal without prejudice, as the appellant urges. *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364."

2. *The Question Sought to Be Here Reviewed and the Reasons Why the Writ Should Be Granted.*

The question presented on the present application is as follows:

Under the Seventh Amendment to the Constitu-

tion of the United States, may a Federal Appellate Court, in reversing a judgment entered upon a jury verdict in a Federal District Court, direct the lower court to enter judgment dismissing the complaint without prejudice, where the proofs failed to establish a cause of action and the trial court reserved decision of motions to dismiss the complaint (made at the close of the plaintiff's case and at the close of the entire case) until after a verdict for the plaintiff, and then erroneously denied said motions?

The Circuit Court of Appeals for the Second Circuit has answered this question in the negative, upon the authority of a decision by a bare majority of this Court in *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, decided April 21, 1913. In doing so, the Court misinterpreted and misapplied the precedent referred to, which, as is pointed out in the brief annexed, has no application to the situation presented by the case at bar.

The holding of the *Slocum* case has been bitterly assailed and harshly criticized. Ever since its decision, lower courts, trial and appellate, have vigilantly seized upon the slightest distinction to escape its limitations upon their powers. Yet the Circuit Court of Appeals for the Second Circuit has unnecessarily widened the scope of that case, giving to it an effect unwarranted by the opinion rendered therein.

Even assuming the *Slocum* case to be applicable, the time has come when this Court may well overrule its decision in that case, so that substantial right may have precedence over technical formalism.

The Circuit Court of Appeals decided the question here presented in a way inconsistent with its own decisions: *Hoffman* v. *American Mills Co.*, 288 Fed. 768, decided March 13, 1923, certiorari denied, 263 U. S. 701; *Clemence* v. *Hud-*

son & M. Ry. Co., 11 F. (2d) 913, decided April 19, 1926; *Royal Card & Paper Co.* v. *Dresdner Bank*, 27 F. (2d) 791, decided August 20, 1928; *Bohenik* v. *Delaware & Hudson Co.*, 49 F. (2d) 722, decided May 11, 1931, certiorari denied, 284 U. S. 643; *Italian Star Line, Inc.* v. *United States Shipping Board Emergency Fleet Corporation*, 53 F. (2d) 359, decided August , 1931. As a result, in the Second Circuit, the law controlling the issue involved is in a confused and unsettled state, and should be clarified by this Court.

The precise question here presented has never been but should be, settled by this Court.

The issue concerns not only the construction of the Seventh Amendment to the Constitution of the United States preserving the right to trial by jury, but also the correct interpretation and application of a decision of this Court, defining the limitations of that Amendment. Involving as it does, the reviewing powers of Federal Appellate Courts throughout the land in all civil jury cases, the question raised is of nationwide interest and importance to judges, practitioners and litigants. Clearly, a decision contrary to that rendered by the Circuit Court of Appeals would substantially diminish repetitious litigation—a result to be achieved, if constitutionally possible.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this court, on a day to be designated, for its review and determination, a full and complete transcript of the record of all proceedings in the said Circuit Court of Appeals had in said cause entitled in that court, "*Donald Redmon, Plaintiff-Respondent, against Baltimore & Carolina Line, Inc., Defendant-Appellant, October*

Term, 1933, No. 268;" that the final order of the Circuit Court of Appeals made and entered in said cause on the 16th day of May, 1934, in so far as the same remands said cause to the District Court for the Southern District of New York for a new trial, may be reversed by this Honorable Court; that this Honorable Court may, by appropriate decree, direct a dismissal of the complaint in said cause, without prejudice; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

GEORGE WHITEFIELD BETTS, JR.,
Counsel for Petitioner.

State of New York,
County of New York—ss.:

GEORGE WHITEFIELD BETTS, JR., being duly sworn, deposes and says that he is one of the counsel for the above named petitioner; that he has read said petition and that said petition is true to the best of his knowledge, information and belief.

GEORGE WHITEFIELD BETTS, JR.

Sworn to before me this
10th day of July, 1934.

ISABEL W. BONNER,
Notary Public,
N. Y. Co.
No. 220, Reg. Office No. 6379.
Comm. Expires March 30, 1936.

Supreme Court of the United States

OCTOBER TERM, 1934—No.

BALTIMORE & CAROLINA LINE, INC.,
(Defendant-Appellant below),
Petitioner,

—against—

DONALD REDMAN,
(Plaintiff-Respondent below),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The case history is summarized in the petition.

FIRST POINT.

The Circuit Court of Appeals misinterpreted and misapplied the decision of this Court in *The Slocum* case, and gave to it a construction inconsistent with its own recent decisions.

The case of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, was a suit at law brought in the Circuit Court for the Western District of Pennsylvania to recover the proceeds of a life insurance policy. At the conclusion of all the evidence, the defendant moved for a directed verdict. The motion was denied, and the case was submitted to the jury, which rendered a verdict for the plaintiff.

Thereupon, pursuant to Pennsylvania state practice, the defendant made a motion for judgment *non obstante veredicto*, which was denied. Upon appeal, the judgment entered on the verdict was reversed, and the court below was directed to enter judgment for the defendant notwithstanding the verdict.

The plaintiff appealed to this Court, which decided that, while the Circuit Court of Appeals had not erred in reversing the judgment, it was powerless under the Seventh Amendment to direct judgment for the defendant on the evidence and was limited to remanding the cause for a new trial.

Substantial distinctions exist between the *Slocum* case and the case at bar. There, the Seventh Amendment was violated because the appellate court "assumed to pass *finally upon the issues of fact presented by the pleadings* and to direct judgment accordingly". Here, the Circuit Court of Appeals was not asked to decide *finally any issue of fact*, but was called upon to declare that *no triable issue of fact was presented by the evidence* and to dismiss the complaint *without prejudice*. There is a patent difference between substituting the decision of an appellate court for the determination by a jury of a disputable question of fact, and holding that the facts adduced on the trial as matter of law presented no triable issue for the jury to determine.

The *Slocum* case recognizes this very distinction (p. 394):

> "In what has been said we would not be understood as implying that a motion for a compulsory non-suit and a demurrer to the evidence are equivalents of a request for a directed verdict, for while they are sometimes spoken of as analogous to it, this only means that for the purpose of each the evidence must be taken most strongly in favor of the opposite party. In other respects they are essentially unlike. *A motion for a compulsory non-suit*

> *looks to an arrest of the trial and a dismissal of the cause, leaving the merits undetermined and the plaintiff free to sue again,* while a request for a directed verdict looks to a completion of the trial and an adjudication of the merits through the accustomed cooperation of the court and jury." (Italics ours.)

The distinction was likewise recognized by the Circuit Court of Appeals for the Second Circuit in *Clemence* v. *Hudson & M. Ry. Co.* (11 F. (2d) 913). Suit was there brought under the Employers' Liability Act to recover damages for personal injuries. Before verdict, the defendant moved for a non-suit, the motion was denied, and a verdict rendered for plaintiff. Thereafter, the trial court set aside the verdict, directed a verdict for the defendant, and entered judgment on it, dismissing the complaint on the merits.

In reviewing this action by the trial court, the Court of Appeals, through Hand, *J.*, commented (p. 915):

> "The trial judge set aside the verdict, and then directed a verdict of his own, upon which he entered judgment. These last two acts he had no power to do. *Slocum* v. *N. Y. Life Ins. Co.* * * * His only lawful conclusion upon setting aside the verdict was to set the cause down for a new trial. * * * Had he let the verdict stand and directed judgment in spite of it, we might perhaps have reversed the judgment and entered the original judgment upon the verdict, which in that case would have stood throughout. *Hoffman* v. *American Mills Co.* (C. C. A.) 228 F. 768. *Had his judgment of nonsuit been right, we might perhaps have affirmed it, though he had set aside the verdict.*" (Italics ours.)

The *Slocum* case is further distinguishable from the instant case in that here the trial court, without objection, reserved decision of petitioner's motions to dismiss until

after the verdict had been rendered, while in the *Slocum* case defendant's motion for a directed verdict was denied *before* the issue went to the jury.

The District Court had constitutional power to *grant* the petitioner's motions despite the verdict, if the decision of the Circuit Court of Appeals for the Second Circuit in *Royal Card & Paper Co.* v. *Dresdner Bank* (27 F. (2d) 791) is a correct exposition of the law. In that case, a motion for a non-suit was made by defendant and the trial judge reserved decision until after a verdict for the plaintiff, when the motion was granted and the complaint dismissed upon the merits. On appeal, it was held that although a dismissal upon the merits was not permissible, there was no error in disregarding the verdict and granting a dismissal *without prejudice*. The judgment below was accordingly modified.

Identical procedure was upheld as constitutional in *Italian Star Line, Inc.* v. *United States Shipping Board Emergency Fleet Corporation* (53 F. (2d) 359). This was a tort action. At the trial a motion to dismiss the complaint had been made at the close of the plaintiff's case and again at the end of the entire case, and decision thereof had been reserved until after a verdict in plaintiff's favor. The trial court then set the verdict aside and dismissed the complaint for failure of proof. It was expressly urged by the plaintiff "that under the doctrine of *Slocum* v. *New York Life Insurance Co.* * * * the trial court had no power to dismiss the complaint after the jury had returned a verdict for the plaintiff; that the most which could be done was to set aside the verdict and declare a new trial".

In the Circuit Court of Appeals for the Second Circuit, after holding that the procedure followed by the District Court would be authorized in the Courts of New York State, and that the State practice had been properly

adopted, Judge Swan, writing for a unanimous bench, stated (p. 360):

> "The propriety of setting aside the verdict and passing upon the motion under such circumstances has been recognized by this Court in *Royal Card & Paper Co.* v. *Dresdner Bank*, 27 F. (2d) 791. *The Slocum case has no application to such a situation. There is no violation of the right to trial by jury in dismissing a complaint for failure to establish a cause of action.* (*Bohenik* v. *Delaware & Hudson Co.*, 49 F. (2) 722.)" (Italics ours.)

The comment of trial judge Coxe in passing upon the motions to dismiss after verdict, is pertinent. Said he (41 F. (2d) 382, at 384):

> "I find nothing in *Slocum v. N. Y. Life Insurance Co.* * * * to conflict with the practice followed in this case. It is not at all unusual, in this District, to reserve decision, on the consent of the parties, on motions to dismiss until after the verdict of the jury. And I can see no illegality or impropriety in such procedure. *The motion raises only a question of law and the decision thereon is in no way a usurpation of the functions of the jury.*" (Italics ours.)

In the case at bar, the Circuit Court of Appeals was asked simply to direct the District Court to do what, according to these precedents, it had the undoubted power to do and should have done. The Seventh Amendment is equally restrictive upon all courts, trial and appellate. (*Pedersen* v. *Delaware, Lackawanna & Western RR.*, 229 U. S. 146.) If the lower court could have dismissed despite the verdict, surely it is only logic to conclude that the Circuit Court of Appeals may direct a dismissal erroneously denied. In doing so, it would be called upon to review, not the verdict of a jury, but only the action of the trial

court in denying the motions to dismiss. The error corrected is the error of the court, not the jury. The province of the jury is not invaded. Such procedure in no wise contravenes the Seventh Amendment.

This view was entertained, at least inferentially, by the Circuit Court of Appeals for the Second Circuit in *Hoffman* v. *American Mills Co.* (288 Fed. 768, certiorari denied, 263 U. S. 701). Upon the trial of that case, the Court submitted the issues to the jury, reserving decision of a motion to dismiss the complaint. After verdict in the plaintiff's favor, the complaint was dismissed, but the verdict itself permitted to stand. The trial judge stated that if he were wrong, the appellate court might direct judgment on the verdict and thus avoid a new trial.

The Circuit Court of Appeals reviewed the dismissal of the complaint, and finding it erroneous, directed judgment upon the verdict. It said (p. 773):

> "We think it would not be a breach of the Seventh Amendment of the Federal Constitution to order the verdict reinstated. In *Slocum* v. *New York Life Ins. Co.*, * * * the verdict was set aside and judgment directed, dismissing the complaint. This was held to be in violation of the Seventh Amendment. But in the case at bar, the Court expressly refused to set aside the verdict. The right of jury trial was therefore accorded the defendant *and our determination here in no wise re-examines the facts tried by the jury.*" (Italics ours.)

If the Circuit Court of Appeals had *upheld* the dismissal below as *proper*, would it, in any greater sense have "re-examined the facts tried by the jury?" Or, if the dismissal below had been erroneously denied and the Circuit Court of Appeals had corrected the error by directing such dismissal, would its determination have involved a re-examina-

tion of "the facts tried by the jury?" These questions answer themselves. In the case cited the appellate court asserted and exercised its power to review the disposition by the trial court of a motion to dismiss the complaint decided after verdict for the plaintiff and to direct judgment accordingly. Yet it refused to do this very thing in the case at bar.

Concededly, in actions at law tried before a jury, if it appears upon appeal that, although the judgment appealed from was erroneous, there remains an issue of fact to be determined before the proper judgment can be rendered, a new trial must be ordered so that the disputed question may be decided by the jury. So much is required by the Seventh Amendment. But, it is submitted, that in cases wherein, as here, the trial court should have disposed of the case without submitting it to the jury at all, either by dismissing the complaint or by directing a verdict, the appellate court should be empowered to direct the entry of the judgment which the trial judge should have ordered, without the useless formality, delay and expense involved in remanding the case for a new trial of a non-existing issue.

SECOND POINT.

The decision of the Circuit Court of Appeals is contrary to the strictly limited interpretation placed upon the *Slocum* case by subsequent decisions of this and lower federal courts.

The *Slocum* case was decided over twenty years ago. Four justices dissented. The vigorous minority opinion was rendered by the present Chief Justice. Of the other members of that court, but one remains. We feel justified in saying that lesser Federal Courts are looking to this tribunal, as presently constituted, for a salutary limitation

of, if not a departure from the technical common law formalism read into the constitution by the *Slocum* case. This very hope was expressed by the District Court of the United States for the District of Minnesota, in *Glynn* v. *Krippner*, 47 F. (2d) 281, at 283:

> "It seems to me very probable that the Supreme Court of the United States as now constituted is unlikely to hold again that the constitution prohibits the granting of judgment notwithstanding the verdict. * * *
>
> I hope that the Court of Appeals may see fit to certify the question of the right of a federal court to grant such judgment where the laws of the state permit that practice, to the Supreme Court of the United States for reconsideration."

In the same case, the Circuit Court of Appeals for the Eighth Circuit (60 F. (2d) 406, 407), admitted that "the dissenting opinion in the *Slocum* case seems to us, as it seemed to the trial judge, convincing", but held that the particular question involved, having once been decided by the Supreme Court, could not be certified for reconsideration; at the same time it pointed out (p. 410):

> "If, for any cause, the Supreme Court may wish to reconsider the question—an application to that tribunal to cause the record in the present case to be certified up to it may afford the appellant the remedy he seeks. For this court there is nothing to do but to affirm the judgment on the authority of the case cited * * *"

Unfortunately, there is no record of such a petition for certiorari having been filed.

As recently as May 8, 1933, the *Slocum* case was severely criticized and rigidly limited to its precise facts by the District Court for the Southern District of New York in

Isaacson v. *United States*, 3 Fed. Supp. 350. There, the trial court denied defendant's motion for a directed verdict and submitted the issues to the jury, which subsequently reported its inability to agree. Thereupon it was directed to return a verdict for the defendant. Plaintiff then asked that the verdict be set aside and a new trial ordered, on the ground that the action of the court violated his rights under the Seventh Amendment.

In denying the motion, Judge Knox distinguished the *Slocum* case and continued (p. 351):

> "In addition, it should be noted that three justices of the Supreme Court concurred with the present Chief Justice, in dissenting from the decision in the *Slocum* case, and that the majority view has been subjected to vigorous attack by various text-writers. See Schofield, New Trials and the Seventh Amendment, 8 Ill. L. Rev. 287, 381, 465; Thorndike, Jury Trials in the United States Courts, 26 Harv. L. Rev. 732; Committee of the American Bar Association, Proceedings, 1913, XXXVIII, 561.
>
> *These factors are conducive to a narrow interpretation of the Slocum case, rather than to an extension of its doctrine to cover such a situation as is presented by the case at bar* * * * *Common sense dictates that the labor and expense of a new trial should not have to be undergone merely because an erroneous ruling was made, where the court, upon further consideration, can correct such ruling.* In my opinion, the Seventh Amendment, as applied in *Slocum* v. *New York Life Insurance Co.*, *supra*, does not deprive the court of this power." (Italics ours.)

The constructions given the Seventh Amendment by this court in the *Slocum* case, decided in 1913, and in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.* (283 U. S. 494), decided in 1931, form a startling contrast. In the

Slocum case this court held that the Seventh Amendment not only preserved the substance of the right to trial by jury, but as well the common law procedural rules governing the right. Discussing the clause: "and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law", it adopted the language of *Parsons* v. *Bedford*, 3 Pet. 433, decided in 1830 (p. 378):

> "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury *in any other manner*. The only *modes* known to the common law to reexamine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings." (Italics ours.)

Again (p. 379), it approved unreservedly the holding of *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13, decided in 1899 to the effect:

> "that, when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be reexamined in any court of the United States, *otherwise than according to the rules of the common law of England*; that by the rules of that law, no other *mode* of reexamination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted *in one of those two ways*, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States." (Italics ours.)

Finally, this court itself concluded (p. 379):

> "These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact and to direct a judgment accordingly must be tested *by the rules of the common law.*" (Italics ours.)

Contrast this interpretation with that contained in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.* (283 U. S. 494). There the jury returned a verdict for the plaintiff. The Court of Appeals reversed because of errors in the charge of the trial court as to the measure of damages. In directing a new trial, however, it restricted the issues to the determination of damages only. It was contended that this procedure constituted a denial of the right to trial by jury, and more specifically, that, since by the rules of the common law, there could be no new trial of a part only of the issues of fact, a resubmission to the jury of the issue of damages alone, was denial of the trial by jury which the Seventh Amendment guarantees.

Mr. Justice Stone dealt with this contention, as follows (pp. 497-498):

> *"It is true that at common law there was no practice of setting aside a verdict in part.* If the verdict was erroneous with respect to any issue, a new trial was directed as to all * * *
>
> Lord Mansfield, in applying the common law rule where the verdict, correct as to one issue, was erroneous as to another, said: "* * * for form's sake, we must set aside the whole verdict * * *" *Edie* v. *East India Co.*, 1 W Bl. 295, 298. *But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but*

> *with substance.* All of vital significance in trial by jury is that *issues of fact* be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law * * * *Beyond this the Seventh Amendment does not exact the retention of old forms of procedure.*" (Italics ours.)

The court referred to the *Slocum* case and used language strictly limiting that decision to the precise situation there presented (p. 499). It said that the *Slocum* case

> "decided *only* that an appellate federal court may not direct judgment *non obstante veredicto, solely* because the verdict given is not sustained by the evidence, but *in that event* must order a new trial. There it was held that the Seventh Amendment does not permit the entry of judgment on a trial at law before a jury *upon an issue of fact,* without the verdict of the jury." (Italics ours.)

It is submitted that this court has thus cast aside the narrow and technical construction given by the *Slocum* case to the Seventh Amendment which for two decades has clothed that constitutional provision with all the cumbersome trappings of an ancient code of civil procedure to the notorious impairment of substantial right, and which has compelled our Federal Courts against their rebellious common sense to apply to modern law-suits a tortuous machinery invented centuries past. We ask that this court apply an enlightened and liberal constitutional philosophy to the case at bar.

While the precise holding of the *Slocum* case may not be overruled on this appeal, that decision may at least be rigidly limited to the narrow confines of the situation there presented, which, as we have pointed out, is substantially different from that obtaining in the instant case.

LAST POINT.

The prayer of the petitioner should be granted.

Your petitioner respectfully submits that the final determination by this court of the questions of law involved is of the utmost importance to lower Federal Courts, to counsel and litigants who have recourse to them, and to the public generally.

It is believed that the decision of the Circuit Court of Appeals represents an erroneous application and an unfortunate misunderstanding of an important decision of this court, and that the result of its decision is to give to the Seventh Amendment a construction inconsistent with its own recent decisions and contrary to the rule of liberal interpretation but recently announced and applied by this Court.

Finally, it is submitted that the precise question here presented has never been decided by this court or by any other Circuit Court of Appeals of the United States.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,
WILLIAM R. MEAGHER,
Counsel for Petitioner.

New York City, July, 1934.